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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
BRANDON LEE MONTGOMERY,  
  
Defendant and Appellant.

C059068  
  
(Super. Ct. No.  
06F07928)

A jury convicted defendant of shooting at an occupied vehicle, possession of a firearm by a felon, and wantonly evading a peace officer, and found he committed these crimes to benefit a street gang. (Pen. Code, §§ 186.22, subd. (b)(1), 246, 12021, subd. (a); Veh. Code, § 2800.2, subd. (a).) The trial court sentenced him to prison for 20 years to life, and he timely appealed.

Defendant contends his trial attorney was incompetent because he failed to object to evidence of uncharged acts, and no substantial evidence supports the finding that the wanton

evasion charge was done to benefit a gang. We affirm the judgment.

## FACTS AND PROCEEDINGS

Sacramento Police Officer Matt Armstrong testified that at about 7:45 p.m. on August 4, 2006, he was on patrol with his partner, Officer John Azevedo, when he began chasing a speeding white Ford Mustang. At one point, the Mustang "spun out" and then drove off on a flat tire. The jury was shown police DVD's of the weaving chase at high speed through traffic. When the Mustang stalled while making a U-turn, the passenger, Shaun Simmons, jumped out and ran, chased on foot by Officer Azevedo. When the Mustang made the U-turn, Officer Armstrong saw the driver, whom he later identified as defendant from a photographic line-up. Simmons, too, identified defendant in a photographic line-up.

Officer Azevedo never lost sight of Simmons, and did not see Simmons throw anything away during the foot-chase. No weapons were found in the area.

Officer Christena O'Shea testified that when the passenger got out of the Mustang, she saw the driver, who fled over a fence. Inside the Mustang she found a metal can containing 30.06 caliber ammunition. At trial, O'Shea identified defendant as the driver of the Mustang.

Christopher D. testified that he called 911 that evening, to report that he saw a white Mustang pull up next to an Acura Integra at an apartment complex, heard shots, then saw the

Mustang speeding away. He assumed the shots came from the Mustang because he saw glass break on the Integra. He denied telling a detective the driver of the Mustang fired the shots, but conceded he told the detective he did not see the passenger move. He described the Integra occupants as "two Asian males" and said there was "possibly" another person in that car, but he could not describe the Mustang's occupants. He told the 911 dispatcher he did not want to be contacted, because he was afraid for himself and his girlfriend.

Shaun Simmons, also known as Shaun English, testified the Mustang belonged to Sean Murphy. Murphy, Simmons and defendant went to a store, where mean stares were exchanged with two Mexican men, which he called "mean mugging." Those men left in a blue car. Simmons had told a detective that defendant called those men "scraps." Simmons knew defendant was "gang affiliated," but did not know which gang. Later that evening, defendant was driving the Mustang and Simmons was in the passenger seat. The Mustang pulled up next to the same blue car, defendant fired shots at it and then drove off. Simmons had previously been arrested while trying to cash a bad check with Sean Murphy. Simmons testified he initially lied to the police and told them that when he first got into the Mustang, defendant bragged about having shot "Scraps, meaning Surenos."

Sean Murphy testified that Shaun Simmons had his Mustang that day. That night defendant called and told Murphy that Simmons was in custody and the Mustang had been impounded. Murphy claimed to own the shells in the car. A police officer

testified Murphy told him that when defendant called Murphy, defendant said he had shot at someone, and "the cops were looking for him for numerous shootings and that he was never going to get caught." Murphy denied telling the officer this.

Simmons's and Murphy's fingerprints were found in the Mustang, but defendant's were not. Shell casings were found at the apartment complex that night.

California Highway Patrol Officer Ken Martin and his partner, Officer Noel Coady stopped a blue Buick that was speeding and driving unsafely on June 18, 2006. Defendant was the driver, and his two passengers were Roy Agpoon, Jr., and Jamari Johnson. A semiautomatic pistol was under the front passenger side seat.

Detective Donald Schumacher testified as a gang expert. He explained that the rival Norteno and Sureno gangs have subsets. Nortenos can commit violent crimes, including drive-by shootings. Gang members advance by "putting in work," meaning committing crimes, including shooting rival gang members. Detective Schumacher described "predicate" offenses, including a fatal shooting by Caesar Thomas Bursiaga in 2005, leading to his murder conviction, and a shooting by John Almeda in 2006 in which the victim was paralyzed, both of which cases were found to be gang-related. The trial court told the jury it had taken judicial notice that Bursiaga had been convicted of murder and Almeda was convicted of attempted first degree murder, in cases arising out of these incidents.

Detective Schumacher testified defendant was a member of the Norteno gang, as his counsel conceded in opening statement. In particular, defendant's tattoos showed he was a member of the Vario Diamonds Sacra Norteno subset. Defendant told peace officers he was a gang member three different times.

When Detective Schumacher prepared to testify about gang-related acts by defendant, the trial court instructed the jury that this evidence was solely to prove that defendant "is, in fact, a member of the Norteno criminal street gang." The subsequent testimony was brief, totaling three pages of the reporter's transcript.

(1) Late in 2006, defendant's girlfriend argued with a person, then returned with defendant "and probably another subject," who shot the person five or six times, but the person lived. No arrest was made because the victim could not identify anyone, but "it was implied that [defendant] was one of our prime suspects."

(2) In 2004, defendant and three other gang members assaulted a mentally disabled person, and took property from the victim. An arrest was made, but the person arrested was not identified.

(3) In 2006, defendant, his cousin Agpoon, and Johnson were stopped in a car and a pistol was found under the passenger seat. This was the crime charged in count 5, *on which the jury acquitted defendant.*

(4) Detective Schumacher said there was a burglary, and that gang members commit burglaries to get firearms or money, but no details of the burglary were provided.

Detective Schumacher found defendant hiding between a shed and a fence at his grandmother's house on September 6, 2006. Defendant fled, but was soon captured.

"Scraps" is a derogatory word Nortenos use to describe Surenos. Staring hard is a form of gang challenge. Scaring people is a way of earning respect for the gang. The car that was fired upon at the apartment complex was never found, which is consistent with a gang shooting. Shooting at rivals benefits the gang by showing the gang is dangerous, which deters other gangs and intimidates members of the community. Fleeing from the police after such a shooting also benefits the gang, first by avoiding capture, and second by giving the escapees bragging rights, showing they were not afraid of the police.

The parties stipulated defendant was convicted of a felony in 2004.

The defense presented no evidence.

As stated, the jury acquitted defendant of possession of ammunition and a firearm, but convicted him of possession of a firearm, shooting at an occupied vehicle and wanton evasion of a peace officer, and found those crimes were committed to benefit a street gang. The trial court sentenced him to prison for 20 years to life.

## DISCUSSION

### I

#### *Ineffective Assistance of Counsel*

Defendant contends trial counsel was incompetent in failing to object to the evidence of uncharged acts described by the gang expert, because even if they were minimally relevant, they were unduly prejudicial and thus inadmissible. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 595 [error to admit cumulative gang evidence, consisting of dozens of incidents, but error harmless].)

To prevail in such a claim defendant must show his attorney acted below the standards of professional competence and there is a reasonable probability he would have obtained a more favorable result in the absence of counsel's failings. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 466-467.)

That an attorney permits objectionable--or arguably objectionable--testimony to enter the record does not of itself suggest incompetence. At times otherwise inadmissible evidence may come out in another form, or the testimony may cut two ways. (E.g., *People v. Ratliff* (1986) 41 Cal.3d 675, 692; *In re Lower* (1979) 100 Cal.App.3d 144, 150.) And "[b]ecause the decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence." (*People v. Freeman* (1994) 8 Cal.4th 450, 490-491; see *People v. Frierson* (1979) 25 Cal.3d 142, 158.) Where the reasons for trial

counsel's failure to object to an alleged error are not revealed by the record, the claim of incompetence "must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation."

(*People v. Mitchell*, *supra*, 164 Cal.App.4th at p. 467; see *People v. Pope* (1979) 23 Cal.3d 412, 426 [remedy lies in habeas corpus], clarified on another point in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

Given defendant's gang tattoos and prior statements to the police admitting gang membership, a defense claim that he was not a gang member would have been futile at best, if not counterproductive. Instead, defense counsel pressed the theme that the police, not having captured the shooter, simply "round[ed] up the usual suspects," that is, focused on defendant, a known gang member, who was blamed by Simmons, and argued that Simmons was not credible or consistent in his stories.

Therefore, the record does not exclude the reasonable possibility that defense counsel did not act out of incompetence, but made a plausible tactical decision to allow the uncharged gang evidence to be introduced. For this reason, defendant's contention of incompetence of counsel cannot be resolved on direct appeal.



## II

### *The Criminal Street Gang Enhancement*

Defendant contends no substantial evidence supports the jury's finding that the felony evasion count was committed to benefit a criminal street gang.

"The proper test to determine a claim of insufficient evidence in a criminal case is whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt. [Citations.] In making this determination, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."" (People v. Barnes (1986) 42 Cal.3d 284, 303; see *id.* at pp. 303-304.)

The gang enhancement applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (Pen. Code, § 186.22, subd. (b)(1).) It is common to prove the gang enhancement by expert testimony about gang culture and habits. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.)

The felony evasion count was based on defendant's wanton driving immediately after the shooting on August 4, 2006. The gang expert testified that fleeing from the police benefits the gang both by helping to keep its members free and able to help the gang, and also by bolstering the status of the escapee, by

demonstrating that he is brave enough to defy the police, and adept enough to evade them.

Defendant argues an escapee's bragging rights benefit the escapee alone, and the purpose of escape is common to all criminals, not just gang members. These claims could be argued to a jury, but they do not show that the gang expert's testimony was implausible or failed to demonstrate a gang purpose in evasion by a gang member after a gang shooting.

Defendant also relies on *People v. Margarejo* (2008) 162 Cal.App.4th 102 (*Margarejo*). There a gang member with an outstanding warrant fled in a wanton manner, and flashed gang signs at other drivers and at pedestrians during the chase. (*Id.* at pp. 105-106.) The court upheld the gang enhancement because the gang signs signaled to the community that that gang had no fear of the police, and distinguished this unusual conduct with "the ordinary goal of an attempted escape, which is to escape." (*Id.* at p. 109.)

We do not read *Margarejo* as *precluding* the possibility that escaping, of itself, may benefit a gang. Here, unlike in *Margarejo*, the evasion was done immediately after a gang shooting, and the jury could find defendant later bragged to Murphy about getting away with it. The jury could rationally find defendant evaded the police in a wanton manner for gang purposes, rather than a mere personal desire to remain free of custody. As the Attorney General argues, "[W]ord on the street that the perpetrator of a brazen drive-by shooting targeting

Surenos had managed to escape the police could well instill fear and respect" that would benefit defendant's gang.

#### DISPOSITION

The judgment is affirmed.

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HULL, J.

We concur:

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BLEASE, Acting P. J.

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BUTZ, J.